In that case there is only one answer which can be given to the question put, viz., that no composition is due on the entry of an heir of investiture.

LORD MURE—The difficulty here turns on the omission in the charter of resignation of certain words which occur in the procuratory on which the charter proceeds. The words omitted are, "whom failing to my own nearest heirs whomsoever," and occur in the disposition and settlement of 1851 immediately after the conveyance to Thomas Macpherson Grant. When the charter of resignation was expede these words were not added; if there had been added the words, "whom failing to my own nearest heirs whomsoever," there could have been no question as to the character in which the second parties would claim the property under Mr Carnegy's settlement.

The question now is, whether they are singular successors or heirs of provision, and had the matter been brought in the shape your Lordship suggested, there might have been nice questions. But on the facts here I think there can be no difficulty in answering the question which is above put, viz., "Are the first parties entitled to a casualty of one year's rent, or of relief-duty only, in respect of the implied entry of the second parties and their said sister?" What was that implied entry as stated in the Case? It is admitted that they completed their title by decree of special service as "the nearest lawful heir-portioners of provision in special of the said deceased Thomas Macpherson Grant. . . . under and by virtue of the foresaid disposition and settlement of the said Thomas Carnegie." That, I think, is not a case for the payment of a composition.

LORD SHAND — I am of the same opinion. The charter of resignation in favour of Thomas Macpherson Grant bears that he is entered under the destination in the settlement of the late Thomas Carnegy, and the parties here are agreed that these ladies succeeded under that destination, for that is put as a statement in the Case. I think therefore that we are only following the decision in several cases, of which *Stirling* v. *Ewart* is one, in holding that as a result of this enfranchisement of the destination the superior must take a relief-duty when an heir succeeds. The branch of the destination is not mentioned in the charter of resignation, but I do not think that will give the superior right to a composition. When the fact of the enfranchisement is conceded, then these ladies take under the same destination as Mr Thomas Macpherson Grant.

LORD DEAS was absent.

The Court pronounced this interlocutor—

"Find and declare that the first parties are not entitled to a composition of one year's rent, but to relief-duty only, in respect of the implied entry of the second parties and their sister, and decern; and find the second parties entitled to expenses, and remit," &c.

Counsel for First Parties—Gloag—Lorimer. Agent—John Tawse, W.S.

Counsel for Second Parties — Mackay — H. Johnston. Agents — Lindsay, Howe, & Co., W.S.

Saturday, November 1.

FIRST DIVISION.

[Sheriff of Roxburghshire.

MARQUIS OF LOTHIAN *v.* SMITH.

Process—Cessio bonorum, *Petition for at Debtor's Instance—Default—The Bankruptcy and Cessio (Scotland) Act* 1881 (44 *and* 45 *Vict. cap.* 22), *sec.* 9—*The Debtors (Scotland) Act* 1880 (43 *and* 44 *Vict. cap.* 34), *sec.* 9, *sub-sec.* 6.

A debtor who had presented a petition for the benefit of *cessio bonorum* failed to appear on the day fixed for his examination, and the Sheriff found that the failure was wilful, and, on the motion of the creditors, granted decree of *cessio* in his absence. *Held* that the order for the debtor to appear for examination, pronounced on his own petition, was equivalent to a citation so to appear in the sense of section 9 of the Bankruptcy and Cessio Act 1881, and therefore that decree of *cessio* had been rightly pronounced.

The Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. cap. 22), section 9, provides—"If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful, he may, in the debtor's absence, pronounce decree of *cessio bonorum*."

The Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34), section 9, sub-section 6, provides—"The expense of obtaining the decree [appointing a debtor to execute a disposition *omnium bonorum*], and of the disposition *omnium bonorum*, shall be paid out of the readiest of the funds thereby conveyed."

Thomas Smith, coal merchant, Jedburgh, presented a petition for *cessio bonorum* in the Sheriff Court of Roxburghshire on 23d May 1884, praying the Court to find that he was notour bankrupt, that he was unable to pay his debts, that he was ready to surrender his whole means and estate for behoof of his creditors, and that his inability to pay his debts had arisen solely from his misfortunes and losses. He submitted a list of his creditors. Among the creditors was the Marquis of Lothian, whose agent had upon the 17th of May 1884 intimated to Smith that unless a debt of £95, 14s. 7d. due by him, and for which the Marquis of Lothian held decree which had been followed by a charge and poinding, was paid, a petition for *cessio* against him would be forthwith presented.

Upon the 23d May 1884 the Sheriff-Substitute pronounced the usual first deliverance, appointing the petitioner to publish a notice of his petition in the *Edinburgh Gazette*, to make special intimation to his creditors, and requiring him and his creditors to appear on 19th June as the day fixed for the petitioner's public examination, and the petitioner to lodge six days previous thereto a state of his affairs.

The petitioner failed to appear upon 19th June, the day appointed by the previous interlocutor, and the Sheriff-Substitute pronounced this interlocutor:—"The debtor having failed to appear in obedience to the order of Court, dated 23d May last, and the Sheriff being satisfied that such

failure is wilful, on the application of all the compearing creditors, and on their motion, decerns the debtor Thomas Smith to execute a disposition *omnium bonorum* to and in favour of Alexander Sturrock, solicitor, Jedburgh," whom he appointed trustee for behoof of Smith's creditors. Thereafter, on the trustee's application, the Sheriff-Substitute on 24th June granted a warrant to take possession of all money and moveables belonging to the debtor, and, if necessary for that purpose, to search the debtor's premises, to open lockfast places, and search his person.

Smith appealed against these interlocutors to the Sheriff.

On 22d July 1884 the Sheriff pronounced this interlocutor: — "Finds that the pursuer of the action failed to lodge in the hands of the Sheriff-Clerk, as required by the fourth section of the Statute 6 and 7 Will. IV., cap. 56, all the books, papers, and documents relating to his affairs, and failed, on the day appointed for the compearance of the creditors, to appear in Court for examination, without any sufficient cause for said failures; therefore dismisses the petition, and decerns.

"*Note.*—This is a petition for *cessio*, not at the instance of a creditor, but at the instance of a debtor against his creditors. The procedure in it is regulated by the seventh section of the Debtors (Scotland) Act 1880, which imports into it the provisions and conditions of the 6 and 7 Will. IV., cap. 56, as well as those of the relative Acts of Sederunt of the Court of Session of 6th June 1839. By the seventh section of that Act of Sederunt it is provided that 'if the debtor failed to lodge in the hands of the Sheriff-Clerk the state book and other documents required by section 4 of the statute by the time therein specified, the process shall be dismissed by the Sheriff, unless he shall be satisfied that the debtor had sufficient excuse.' There is no doubt as to the fact of failure, and no sufficient excuse for it either was at the time or has now been stated.

"The fifth section of the statute enacts that on the day 'appointed for the compearance of the creditors the debtor shall appear in public court in presence of the Sheriff for examination as to his affairs;' and certain provisions are made for the event of the debtor refusing to be put on oath, or to answer questions, or to subscribe his examination, all implying that he shall have appeared for the purpose of being examined. No express sanction is provided for the case of a debtor failing to appear for examination. But that he shall appear is an imperative enactment of the statute, the non-observance of which is inconsistent with further procedure under it as therein provided. The Sheriff therefore is of opinion that in such case nothing can follow but a dismissal of the action. It is like the case of a pursuer not appearing to maintain his action. In a work of practice (M'Glashan, p. 482-3, non-compearance of debtor) dismissal of the action is said to be the course followed in such case; and although the Sheriff has not been able to find any decision upon the point, he sees no other appropriate deliverance.

"The action of *cessio bonorum* at the instance of a creditor and the proceedings therein are regulated by sections 8 and 9 of the Debtors (Scotland) Act 1880. These do not apply to the present action.

"In pronouncing the interlocutor appealed from, this distinction has not been adverted to. But these later statutes are not clearly expressed, and do not appear to be carefully framed."

The Marquis of Lothian appealed to the Court of Session, and argued that the debtor was not entitled first to commit a statutory default and then to take the benefit of it to the effect of annulling all the procedure that had taken place in the case.

The respondent argued that he had not failed to appear in "obedience to a citation," and therefore the condition on which decree of *cessio* could be granted in his absence did not exist. The decree of 19th June was therefore erroneous.

At advising—

Lord President—This is an application for *cessio* at the instance of the debtor himself, and upon the 23rd May 1884 the Sheriff-Substitute granted the usual warrant appointing the petitioner to publish a notice in the *Gazette*, and requiring the creditors to appear, and the bankrupt himself to appear, and to lodge a state of his affairs. The date of compearance was the 19th of June following, and as the debtor did not then appear, what the Sheriff-Substitute did is embodied in the first part of his interlocutor of that date:—"The debtor having failed to appear in obedience to the order of Court of date 23rd May last, at a meeting held this day, and the Sheriff being satisfied that such failure is wilful, on the application of all the compearing creditors, and on their motion, decerns the debtor Thomas Smith to execute a disposition *omnium bonorum* to and in favour of Alexander Sturrock, Solicitor, Jedburgh, who is hereby appointed trustee for behoof of the creditors of said debtor." Now, this interlocutor was pronounced, I apprehend, in terms of sec. 9 of the Bankruptcy and Cessio (Scotland) Act 1881, which is in these terms—"If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful, he may, in the debtor's absence, pronounce decree of *cessio bonorum*." But the Act of 1881 was passed to amend the previous Act of 1880. The Act of 1880 provides for a process of *cessio* being brought either by a debtor or by any of his creditors, and therefore every section of the amending Act which is not limited in its operation to one of these two classes of *cessio* must be held to apply to both, and this 9th section from the generality of its language plainly does apply to both, that is to say, it applies to a *cessio* at the instance of a creditor, and it also applies to a *cessio* at the instance of a debtor. Now, in a *cessio* at the instance of a debtor himself it is argued that there is no such thing as a citation of a debtor; undoubtedly the language might have been better selected, but I think that the intention of the Legislature is quite apparent, and that the order to appear upon the day appointed for the compearance of the creditors was to be an equivalent for formal citation of the debtor. If it were otherwise, then this section would apply only to *cessio* when pursued by a creditor. As the matter stands under section 9 of the Act of 1881, I am perfectly satisfied that the intention of the Legislature was that wilful failure to appear should be attended by the same consequences

whether the petition for *cessio* was presented by the debtor or by his creditors. I therefore think that the interlocutor pronounced by the Sheriff-Substitute upon the 19th June was the proper interlocutor in the circumstances, while that of the 24th June followed as a matter of course. The Sheriff on the other hand seems to have been led into an error through not attending to the provisions of the Act of 1881. I think, therefore, that we should recall the interlocutor of the Sheriff, and affirm the two interlocutors of the Sheriff-Substitute.

Lord Mure concurred.

Lord Shand—In no view of the case does it appear to me to be possible that the Sheriff's interlocutor can be sustained. The provisions of the 9th section are clearly in favour of the rights of creditors, and the Sheriff is authorised to pronounce a decree of *cessio* if he believes that the debtor's failure to appear is wilful. In the present case the bankrupt committed what the Sheriff-Substitute believed to be a wilful default, and he now asks that he is to derive a benefit from this wilful default. The creditors met, and litiscontestation ensued, and I think that they are entitled to keep the proceedings in Court, and that the debtor is not entitled to have his petition dismissed through a failure on his part to comply with the provisions of the statute. I think also that the Sheriff-Substitute was right in his interpretation of section 9 of the Act of 1881, and that in the case of a petitioning debtor citation in the literal sense of the word is not necessary.

The Court recalled the interlocutor of the Sheriff, and affirmed the two interlocutors of the Sheriff-Substitute, and authorised the trustee to pay the appellant's expenses as taxed.

Counsel for Appellant (Marquis of Lothian)—Graham Murray—Baxter. Agent—P. Morison, S.S.C.

Counsel for Respondent (Smith) — Campbell Smith. Agent—David Hunter, S.S.C.

Saturday, November 1.*

FIRST DIVISION.

HOPE *v.* HOPE.

Trust—Removal of Trustee—Judicial Factor—Differences between Trustees.

It is not a relevant ground of application by a trustee for the removal of trustees and the appointment of a judicial factor that the trustees have been for many years at variance as to the management of the estate, and that the management of the estate is at a dead-lock in consequence.

Averments by a trustee in a testamentary trust, which were *held* insufficient to warrant the removal of himself and his co-trustee from office and the appointment of a judicial factor.

This was a petition by James Hope, W.S., for removal of himself and his co-trustee John Hope, W.S., from the office of trustees on the trust-estate of the late Dr Thomas Charles Hope, and for appointment of a judicial factor on the estate.

Dr Hope died in 1844. By his trust-disposition and settlement he left his whole estate, heritable and moveable, to trustees. For more than twenty years before 1884 the petitioner and the respondent, John Hope, had been the only surviving and acting trustees in the trust. Dr Hope, by his settlement, conveyed to the trustees Wardie House, near Edinburgh, and land adjoining it. The trustees were directed to sell the house and ground, and divide the proceeds in manner provided by the trust-disposition for division of the residue of the estate. It was, however, declared that the house and grounds should not be sold so long as the truster's five nieces, or any two of them, should be alive and unmarried, or in widowhood, and should desire to reside there. The division of residue was to be equally among the seven nephews and nieces of the truster who were named in the settlement.

The averments on which the petition was presented were—That there had been from time to time interim divisions of the estate, by which much the greater part of it had been divided, but there still remained Wardie Lodge, and certain sums of money; "that for very many years past the petitioner and his co-trustee, the said John Hope, have been unable to agree upon the management of the said trust-estate, and in consequence thereof the trust has for some considerable time been at a dead-lock, and as the trust-estate is suffering through the differences between the petitioner and his co-trustee it is necessary and proper that a judicial factor should be appointed to manage the said estate and carry out the purposes of the trust so far as remaining unfulfilled."

John Hope lodged answers. He denied the material averments of the petitioner, stating that there was only one matter on which a difficulty had existed (as to a payment of £350 to each beneficiary); that the existing trust management was simple and inexpensive; and that the appointment of a judicial factor would be expensive and wholly unnecessary.

After hearing counsel on the petition and answers, the Court allowed the petitioner to amend the petition by averring more specifically the differences that existed between the trustees.

The petitioner then stated—(1) That for a long period there had been no law-agent in the trust, though the deed contemplated that one should be appointed, and the petitioner had frequently urged such an appointment. (2) That a sum of bank stock had been some years before set free for distribution, and he had urged the distribution of it; that he had done so in 1877, but the respondent had disregarded his representations; that the stock was then selling at £232 per cent., but in consequence of the respondent's attitude it had been held till 1881, when it could only be sold at £203, and serious loss was thus caused; that the price had never been distributed, because the respondent insisted on the beneficiaries giving formal discharges instead of mere receipts, which was quite unnecessary. (3) That though only a few matters remained undisposed of in the trust, it had become unworkable owing to the obstruction and often unreasonable action of the respondent, who did not answer the petitioner's letters, and refused to furnish a state of the trust affairs. (4) That diverse opinion, and hence inaction, existed

* Decided 18th October.